UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re TELESERVICES GROUP, INC., Debtor.	
MARCIA R. MEOLI, Trustee, Plaintiff, vs. HUNTINGTON NATIONAL BANK, Defendant.	Case No. 1:12-cv-1113−PLM Chief Judge Paul L. Maloney

AMICUS CURIAE BRIEF OF AMERICAN BANKERS ASSOCIATION, THE FINANCIAL SERVICES ROUNDTABLE, CONSUMER BANKERS ASSOCIATION, MICHIGAN BANKERS ASSOCIATION, AND OHIO BANKERS LEAGUE

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STATEMENTS OF INTEREST

American Bankers Association ("**ABA**") is the principal national trade association of the banking industry in the United States. ABA has members in each of the fifty states and the District of Columbia, more than 1,000 of which are national banks. ABA member banks hold approximately 90% of the domestic assets of the banking industry in the United States. ABA frequently appears in litigation as a party or amicus where the issues raised in a case are of widespread importance and concern to the industry. ABA is authorized to pursue its national-bank members' interests in ensuring a consistent and reasonable interpretation of the transferee provisions of the Bankruptcy Code.

The Financial Services Roundtable ("**Roundtable**") represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through their Chief Executive Officers and other senior executives nominated by their CEOs. Roundtable member companies account directly for $74.7 trillion in managed assets, $1.1 trillion in revenue, and 2.3 million jobs.

The Consumer Bankers Association ("**CBA**") is the only national financial trade group focused exclusively on retail banking and personal financial services — banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

The Michigan Bankers Association ("**MBA**") is the premier trade organization for Michigan's banking industry. The MBA, founded in 1887, is a nonprofit trade association serving Michigan's banks. The MBA's members have more than 3,000 branches located throughout the state and have combined assets of more than $200 billion.

The Ohio Bankers League ("**OBL**," and, collectively with ABA, Roundtable, CBA, and MBA, "**amici**") is a nonprofit trade association that represents the interests of Ohio's commercial banks, savings banks, savings associations as well as their holding companies and affiliated organizations. The Ohio Bankers League has over 200 members, which represents the overwhelming majority of all depository institutions doing business in the state. The majority of OBL members make commercial loans and have commercial deposit accounts similar to the relationships at issue in this case. OBL membership represents the full spectrum of FDIC-insured depository institutions, including small mutual savings associations owned by their depositors, community banks that are locally owned and operated, and large regional and multistate holding companies that have several bank and non-bank affiliates and conduct business from coast to coast. Ohio depository institutions directly employ more than 130,000 people in Ohio.

The amici's member banks face the prospect of "great and unimagined liability," leaving them "vulnerable to nuisance suits and settlements"[1] and exorbitant monitoring costs that "would fall on solvent customers without significantly increasing the protection of creditors"[2] if the word "transferee" is given the new interpretation proposed by the bankruptcy court in this case.

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[1] *See Christy v. Alexander & Alexander of N.Y. Inc.* (*In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*), 130 F.3d 52, 56 (2d Cir. 1997).

[2] *See Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 893 (7th Cir. 1988).

ARGUMENT

I. CONTROLLING PRECEDENT HOLDS THAT A BANK DOES NOT BECOME A TRANSFEREE OF DEPOSITED FUNDS THE INSTANT THE FUNDS ARE CREDITED TO A CLIENT'S DEPOSIT ACCOUNT.

The bankruptcy court proposes that the bank's client in this case (Cyberco), was the "initial" transferee of funds wired from another entity (Teleservices), whose trustee here seeks recovery. Report and Recommendation ("**R&R**"), at 31 (proposed conclusion of law number 13). The bankruptcy court further concludes that the bank (Huntington) was the "immediate," or "subsequent," transferee of Cyberco's deposited funds the instant that Huntington credited Cyberco's deposit account with the deposited funds. *Id.* at 32 (proposed conclusion of law number 15).[3] This is contrary to controlling precedent in this and every other Circuit and should be overruled.

Every Court of Appeals, including the Sixth Circuit, to have interpreted the word "transferee" for purposes of the Bankruptcy Code's avoidance provisions has either expressly adopted, or ruled consistently with, the modern "dominion and control" test for transferee status that was adopted by Judge Easterbrook (joined by Judge Posner) in a unanimous panel of the Seventh Circuit in *Bonded Financial Services, Inc. v. European American Bank*, 838 F.2d 890 (7th Cir. 1988).[4] The Sixth Circuit endorsed and applied the *Bonded Financial* test for the second time in as many cases in *Taunt v. Hurtado* (*In re Hurtado*), 342 F.3d 528 (6th Cir. 2003), in which it observed that the *Bonded Financial* "dominion-and-control test . . . has been widely adopted."[5]

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[3] "Initial" transferees are the first transferees in a chain of ownership. *See* 11 U.S.C. § 550(a)(1). "Subsequent" transferees are either "immediate" or "mediate" transferees. *See* § 550(a)(2). Immediate transferees receive property from initial transferees. Mediate transferees receive property from immediate and other mediate transferees. For ease of reference, this brief will adopt the inclusive term "subsequent" transferee when it is necessary to distinguish from an "initial" transferee.

[4] *See Richardson v. Preston* (*In re Antex, Inc.*), 397 B.R. 168 (B.A.P. 1st Cir. 2008) (noting BAP's earlier adoption of *Bonded Financial*); *Christy v. Alexander & Alexander of N.Y. Inc. (In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*), 130 F.3d 52, 57–58 (continued…)

The bankruptcy court here, however, suggests that *Hurtado* adopted only that portion of *Bonded Financial* that addresses "initial" transferees and thereby declares itself "not constrained" by any portion of *Bonded Financial* that is inconsistent with the bankruptcy court's result. *See* R&R Tab 2, at 48–49; *infra* Part II. The bankruptcy court is incorrect. As discussed

(2d Cir. 1997) (discussing and adopting *Bonded Financial*); *Bowers v. Atlanta Motor Speedway, Inc.* (*In re Se. Hotel Props. Ltd. P'ship*), 99 F.3d 151, 156 (4th Cir. 1996) (adopting *Bonded Financial*); *Sec. First Nat'l Bank v. Brunson* (*In re Coutee*), 984 F.2d 138, 141 (5th Cir. 1993) (adopting *Bonded Financial*); *Taunt v. Hurtado* (*In re Hurtado*), 342 F.3d 528, 533–34 (6th Cir. 2003) (adopting and applying *Bonded Financial*); *Luker v. Reeves* (*In re Reeves*), 65 F.3d 670, 676 (8th Cir. 1995) (adopting *Bonded Financial*); *Abele v. Modern Fin. Plans Servs., Inc.* (*In re Cohen*), 300 F.3d 1097, 1102 & n.2 (9th Cir. 2002) (adopting *Bonded Financial*); *Malloy v. Citizens Bank of Sapulpa* (*In re First Sec. Mortg. Co.*), 33 F.3d 42, 44 (10th Cir. 1994) (adopting *Bonded Financial*); *Bailey v. Big Sky Motors, Ltd.* (*In re Ogden*), 314 F.3d 1190, 1202 (10th Cir. 2002) (confirming adoption of *Bonded Financial*); *Nordberg v. Societe Generale* (*In re Chase & Sanborn Corp.*), 848 F.2d 1196, 1200 & n.11 (11th Cir. 1988) (discussing then-recently decided *Bonded Financial* and adopting a consistent test); *Andreini & Co. v. Pony Exp. Delivery Servs.* (*In re Pony Exp. Delivery Servs., Inc.*), 440 F.3d 1296, 1300-01 (11th Cir. 2006) (citing *Bonded Financial* as the equivalent of the Circuit's own test). Other Circuits' pre-Code precedents are entirely consistent with the modern rule. *In re Erie Forge & Steel Corp.*, 456 F.2d 801, 804–05 (3d Cir. 1972) (observing that "although money deposited in a checking account in the ordinary course of business itself becomes the property of the bank, a transfer of the depositor's property has not occurred because of the obligation of the bank to pay checks drawn on the deposit"); *Cusick v. Second Nat'l Bank,* 115 F.2d 150, 152 n.4 (D.C. Cir. 1940) ("If both depositor and the bank intend, at the time the deposit is made, that it be subject to withdrawal and not applied to payment of the depositor's debt to the bank, the transaction does not constitute a transfer . . . . If, however, the deposit is given by the depositor or received by the bank as a payment on the depositor's note, a transfer occurs . . . .").

[5] *Hurtado*, 342 F.3d at 533 (internal quotation marks omitted); *see also id.* (noting that the Sixth Circuit "applied th[e] test" in *First Nat'l Bank of Barnesville v. Rafoth* (*In re Baker & Getty Fin. Servs., Inc.*), 974 F.2d 712 (6th Cir. 1992)). Although the Sixth Circuit discussed and applied the principles of *Bonded Financial* in *Baker & Getty*, the Court more fully analyzed — and expressly adopted —the *Bonded Financial* test in *Hurtado*. Thus, this brief focuses on the Sixth Circuit's more fulsome (and more recent) analysis in *Hurtado*.

below, *Hurtado* quoted the *Bonded Financial* "dominion and control" test as being a test for "transferees," not just "initial transferees." *See Hurtado*, 342 F.3d at 533; *infra* Part I.C.1.[6]

Under *Bonded Financial* (not to mention other Courts of Appeals' precedents applying *Bonded Financial*), it is inarguably the case that a transferee is one who exercises a level of dominion and control over transferred property that is greater than whatever dominion or control a bank may exercise by holding deposited funds for payment at its client's direction. Consistent language in, and the logic of, *Hurtado* more than bears this out — because *Hurtado* held that a deposit account holder was an initial transferee, without ever suggesting the bank was any kind of transferee. The bankruptcy court disagreed with, and so disregarded, this contrary precedent.

This Court should reject the bankruptcy court's flawed attempt to reason its way around *Hurtado* and *Bonded Financial*. This Court should correct the flawed reasoning proposing that Huntington became a subsequent transferee of Cyberco's deposited funds the instant that Huntington credited the funds to Cyberco's deposit account.

A. *Bonded Financial* Held That a Bank Becomes a Subsequent Transferee of Deposited Funds Only When It Keeps the Funds as Its Own.

Before demonstrating that *Hurtado* fully adopted *Bonded Financial*, it is helpful to delineate precisely what *Bonded Financial* held. The facts of *Bonded Financial* are straightforward. A bank received a check made payable to it but notated as intended for deposit to a client's account. *Bonded Financial*, 838 F.2d at 891. The bank accepted the check and, as directed, credited its client's account. *Id.* The funds sat untouched for ten days. *Id.* Then the client instructed the bank to apply the funds to his loan balance at the bank. *Id.* The Court had

[6] Indeed, before reaching a contrary conclusion in 2012, the court itself in 2009 acknowledged that *Hurtado* fully adopted *Bonded Financial*. *See* R&R Tab 8, at 19:10–16; *infra* Part II.A.3.

to determine whether the bank was a transferee at all, and, if so, whether it was an initial transferee or a subsequent transferee. To do this, the Court created what is now called the "dominion and control" test to define a transferee:

> [W]e think the minimum requirement of status as a "transferee" is dominion over the money or other asset, the right to put the money to one's own purposes.

Bonded Financial, 838 F.2d at 893.[7] The Court expressly noted it was not appealing to equity to relieve the bank of liability, but was "*defin*[*ing*] 'transferee.'" *Id.* at 895 (italics in original).

Judge Easterbrook (joined by a unanimous panel including Judge Posner) held that the bank's client was the "initial" transferee of the funds. *Id.* at 894. Judge Easterbrook then held that the dominion and control test "governs the question whether entities are subsequent transferees, too." *Id.* at 896. He applied the test and determined that the bank became a subsequent transferee when the account holder used the funds to make a loan payment. *See id.* Thus, the Court held that the client maintained the necessary level of legal dominion and control of the funds for the ten days before he made a loan payment to the bank out of the account, and that only then did the bank become a subsequent transferee of the funds: "The Bank had no dominion over the $200,000 until January 31, when Ryan instructed the Bank to debit the account to reduce the loan . . . ." *Id.* at 894 (emphasis added), *see also id.* at 898 ("The Bank is a subsequent transferee . . . ."). Therefore, *Bonded Financial* necessarily held that the bank was not a subsequent transferee of the deposited funds until the account holder directed the bank to make the loan payment.

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[7] *Bonded Financial* never used the word "control." Several months after the *Bonded Financial* decision in 1988, however, the Eleventh Circuit cited approvingly, and ruled consistently with, *Bonded Financial* in *Chase & Sanborn*, using the word "control" in enunciating its test. *See, e.g.*, *Chase & Sanborn*, 848 F.2d at 1200 ("When trustees seek recovery of allegedly fraudulent conveyances from banks, the outcome of the cases turn on whether the banks actually controlled the funds or merely served as conduits, holding money that was in fact controlled by either the transferor or the real transferee."). Later cases, including *Hurtado*, simply refer to the resulting (and widely adopted) test as the "dominion and control test." *See, e.g.*, *Hurtado*, 342 F.3d at 533 ("The test *Bonded* created has come to be known as the dominion-and-control test, and has been widely adopted" (internal quotation marks omitted).). The Ninth Circuit has noted that several circuits "combined" *Bonded Financial*'s "dominion" test and *Chase & Sanborn*'s "control" test, "or at least combined their names." *See In re Incomnet, Inc.*, 463 F.3d 1064, 1071 (9th Cir. 2006). This brief uses the Sixth's Circuit's terminology and analysis. In any event, the distinction is irrelevant here, because the bankruptcy court's analysis is out of accord with all Circuits' versions of the test.

The formal operation of the debtor/creditor relationship did not alter this analysis. It is thus logically inescapable that the debtor/creditor relationship does not satisfy *Bonded Financial*'s requirement for "dominion" — that is, "the right to put the money to one's own purposes." *See id.* at 893. It is unreasonable to conclude, as the bankruptcy court and trustee implicitly do, that Circuit Judges Easterbrook and Posner (not to mention all the circuit court judges on all the Courts of Appeals panels that have adopted *Bonded Financial*) failed to appreciate the nature of the debtor/creditor relationship in defining banks' transferee status in relationship to deposited funds. Indeed, the Ninth Circuit recently addressed the application of *Bonded Financial*'s test in light of this debtor/creditor relationship:

> In such a case, the bank will initially take title over the depositor's funds, but it will not have dominion over them because it has no discretion over the uses to which the depositor's money is to be put. Thus, the bank is not the transferee . . . . If the third party subsequently gives that money to the bank to reduce its own debt, the bank will then have dominion and legal title, but in such a case the bank is a transferee of funds from the third party, not from the initial depositor.

In re Incomnet, Inc., 463 F.3d 1064, 1074 & n.12 (9th Cir. 2006) (citing authorities discussing the debtor/creditor relationship between a bank and its deposit account holder).

There is no logical way around the fact that, under *Bonded Financial*, a bank does not become a subsequent (or "immediate") transferee of deposited funds until the bank accepts the deposited funds as the ultimate recipient of the funds and with no further duty to pay them out at the client's direction — such as by taking the funds as loan payments, interest payments, bank fees, or by effecting a setoff. This holding of *Bonded Financial* is not dicta or some subsidiary observation: it is the test's essence. It is logically necessary to the analysis in *Bonded Financial*. Accordingly, when the Sixth Circuit adopted *Bonded Financial*'s analysis, it must have understood and adopted this central premise.

B. Circuits Applying *Bonded Financial* Have Ruled Consistently that a Bank Holding Deposits "Is Not A Transferee At All."

Since *Bonded Financial* — in response to certain courts' attempts to avoid its limitations, as in the present case — the Courts of Appeals have confirmed that the level of dominion and control necessary requires the right to put the funds to one's own, ultimate legal use. No Court of Appeals defines the word "transferee" as simply one who receives a "transfer," as that term is defined in 11 U.S.C. § 101(54). For example, the Second Circuit specifically considered and declined to adopt a simplistic rule that "the word 'transferee' means the person to whom [a payment] is transferred." *See Christy v. Alexander & Alexander of N.Y. Inc.* (*In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*), 130 F.3d 52, 57 (2d Cir. 1997). Rather, *Finley* held that as a matter of statutory interpretation, a transferee is "the entity to whom the payment is made" or "the one to whom the funds ultimately should go." *See id.* (emphasis added).[8] Similarly, the Eleventh Circuit explained that courts refuse to "employ[] an overly literal interpretation" of the Bankruptcy Code's transferee provisions to allow trustees to recover from banks and other agents who are not "real parties to the transaction." *Nordberg v. Societe Generale* (*In re Chase & Sanborn Corp.*), 848 F.2d 1196, 1199–1200 (11th Cir. 1988).

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[8] This reasonable interpretation moots the irrelevant question of whether a deposit is a transfer. A deposit is a transfer of something to someone, but that says nothing about to whom the deposit is transferred, that is, who is the transferee. Under *Bonded Financial*, *Hurtado*, and other precedents, the transferee of a deposit is the deposit account holder, not the bank. If that deposit is later paid to the bank as a loan payment, or a landlord as a lease payment, the bank or landlord then (and only then) becomes a transferee.

And, although the bankruptcy court does not discuss it, several Courts of Appeals have considered and rejected the bankruptcy court's precise view that it is sufficient dominion and control that a bank technically holds a client's deposited funds as its own in a debtor/creditor relationship. The Eleventh Circuit in *Chase & Sanborn* noted that the lower courts had suggested that if a bank holding deposited funds was a transferee at all, it was a subsequent transferee. *Id.* at 1200 n.11. The Court mooted the question by holding simply that the bank "is not a transferee at all." *Id.* The Tenth Circuit pithily rejected the argument the bankruptcy court makes here: "Plaintiff's reliance on the fundamental banking principle that money deposited in a bank account becomes property of the bank, offset by a debt to the account holder, is misplaced. That legal concept does nothing to aid his argument . . . ." *Malloy v. Citizens Bank of Sapulpa* (*In re First Sec. Mortg. Co.*), 33 F.3d 42, 44 n.5 (10th Cir. 1994). And, as noted above, the Ninth Circuit applied and analyzed *Bonded Financial*'s test to deposits in light of the debtor/creditor relationship between a bank and its deposit account holder. *See Incomnet*, 463 F.3d at 1074 & n.12. These holdings are not extensions of *Bonded Financial*; they are necessary to its theoretical moorings.

In the end, the bankruptcy court disagrees with all of this. But on this pure question of law, this Court exercises *de novo* review. The question for this Court is whether the Sixth Circuit disagrees with all of this.

C. In *Hurtado*, the Sixth Circuit Adopted Both *Bonded Financial*'s Analysis and Its Definition of "Transferee."

The Sixth Circuit's analyses in transferee cases are entirely consistent with the above principles. The Sixth Circuit formally endorsed the *Bonded Financial* test and applied it for the second time in as many cases in *Hurtado*, in which it observed that the *Bonded Financial* "dominion-and-control test . . . has been widely adopted."[9] In *Hurtado*, a debtor had his mother hold his funds in her bank account to hide them from his creditors. *See Hurtado*, 342 F.3d at 530. The mother paid the funds out at her son's direction, in an obvious conspiracy to defraud his creditors. *See id.* at 531. She then claimed she was not a transferee of her son's funds. *Id.* at 536 & n.4. The *Hurtado* court rejected her argument and held the mother, as the deposit account holder (and willful participant in fraud), liable as an initial transferee. *Id.* at 536.

1. *Hurtado* applies to all transferees, not just initial transferees.

After noting that the Sixth Circuit had earlier applied *Bonded Financial* in *First National Bank of Barnesville v. Rafoth* (*In re Baker & Getty Financial Services, Inc.*), 974 F.2d 712 (6th Cir. 1992), *Hurtado* adopted *Bonded Financial*'s test for transferee status without reservation or qualification. It did not adopt some limited portion of it, or hold that it applied only to "initial" transferees.

The most textually obvious evidence that *Hurtado* adopted *Bonded Financial*'s rule of statutory interpretation applicable to all transferees is that the *Hurtado* court observed that

[9] *Hurtado*, 342 F.3d at 533 (internal quotation marks omitted); *see also id.* (noting that the Sixth Circuit "applied th[e] test" in *Baker & Getty*, 974 F.2d 712). As noted *supra* in note 5, *Baker & Getty* rules consistently with, but does not expressly adopt, the *Bonded Financial* test. In *Baker & Getty*, a bank was held to be the initial transferee of funds ultimately paid to it to reduce a loan balance, consistent with the case law and the amici's position here. *See Baker & Getty*, 974 F.2d at 722.

Bonded Financial "requir[es] that a party do more than merely touch the money before becoming a transferee." *Hurtado*, 342 F.3d at 533 (internal quotation marks omitted) (emphasis added). *Hurtado* then quoted *Bonded Financial*'s key holding, which also is not limited only to initial transferees:

> "[W]e think the minimum requirement of status as a 'transferee' is dominion over the money or other asset, the right to put the money to one's own purposes."

Hurtado at 533 (quoting *Bonded Financial*, 838 F.2d at 893) (alteration in original) (emphasis added).

As a matter of law, fact, and logic, *Hurtado* adopted *Bonded Financial*'s statutory interpretation of the word "transferee." *See Bonded Financial*, 838 F.2d at 895 (noting that the court was "*defin*[*ing*] 'transferee,'" not appealing to equity or policy).

2. *Hurtado* is consistent with *Bonded Financial*'s conclusion that a bank is not a transferee of deposited funds.

Besides expressly adopting the dominion and control test for transferees, *Hurtado*'s analysis is entirely consistent with the well-settled rule that banks do not exercise sufficient legal dominion and control of deposited funds to be transferees of those funds.

First, *Hurtado* holds that the mother was the transferee of the funds, not the mother's bank. Indeed, no party appears to have argued so radically as to suggest the bank was a transferee at all. Second, *Hurtado* cites Michigan case law that held that a deposit is prima facie the property of the named account holder. *Hurtado*, 342 F.3d at 535 (citing *Muskegon Lumber & Fuel Co. v. Johnson*, 62 N.W.2d 619, 622 (Mich. 1954)). Third, *Hurtado* refers to the deposit account holder as having "exclusive control" of deposited funds. *Id.* at 530. Fourth, *Hurtado*'s discussion of both *Bonded Financial* and *Baker & Getty* makes clear the panel fully comprehended that the bank in *Bonded Financial* (and the agent in *Baker & Getty*) technically held the deposited funds but were legally bound to follow the transferor's or transferee's instructions. *See id.* at 534–35. In no way does *Hurtado* (or any other Court of Appeals adopting *Bonded Financial*) back away from the holding in *Bonded Financial* that the bank was not a subsequent transferee for ten days, i.e., until the deposited funds were paid to the bank as a loan payment. Lastly, as noted above, *Hurtado* refers to *Bonded Financial* as widely adopted, cites it throughout, and endorses and applies it as fully as an opinion can.[10]

3. *Hurtado* approvingly cites other Circuits' precedents consistent with *Bonded Financial*'s conclusion.

Hurtado also cites approvingly the Second Circuit's *Finley* case and the Tenth Circuit's *Ogden* case without ever backing away from the analysis in those cases. *See Hurtado*, 342 F.3d at 533, 534 n.2 (citing *Finley*, 130 F.3d 52); *id.* at 534 n.2 (citing *Bailey v. Big Sky Motors, Ltd.* (*In re Ogden*), 314 F.3d 1190, 1202 (10th Cir. 2002)). In *Finley*, the court held that an insurance broker was not a "transferee" of money it received and held unrestricted. The broker received a policyholder's premium payment; deposited it to its own bank account; held it as its own for 10 days; wrote a check for the premium amount from its own account; made the check payable to the insurer; and sent the check to the insurer. *Finley*, 130 F.3d at 55. The policyholder went bankrupt, and its trustee sued the broker. *Id.* at 53. *Finley* held that the broker was not a transferee of the premium payment, because it had eventually been paid over to the insurer. *Id.* at 59.

This is notable for several reasons. The broker in *Finley* inarguably received a "transfer" (as defined in 11 U.S.C. § 101(54)), and had far more than "technical" control of the premium

[10] As discussed below in Part II.A.3, the bankruptcy court accepted in 2009 that *Hurtado* fully adopted *Bonded Financial*, before it switched its position in 2012. *See* R&R Tab 8, at 19:10–16.

funds: the broker had the funds in its own deposit account for 10 days, and had the legal right to keep (but did not keep) a percentage of the premium as a commission. *See id.* at 57, 59. Nonetheless, as noted above, the Second Circuit in *Finley* applied the principles of *Bonded Financial* to hold that the broker was not a transferee, even though the broker "was no stranger to" the policyholder or the transaction. *Id.* at 58. The court refused, unlike the bankruptcy court and trustee here, to make the existence of a commercial relationship a kind of scale-tipping factor: "[W]e do not think that the existence of a commercial relationship determines the issue." *Id.* at 58. The court held that "a commercial entity that, in the ordinary course of its business, acts as a mere conduit for funds and performs that role consistent with its contractual undertaking in respect of the challenged transaction, is not an initial transferee . . . ." *Id.* at 59. (Note that no party even suggested that the broker's bank — in whose accounts the premium sat for up to 10 days in one instance — was a transferee.)

The Sixth Circuit panel in *Hurtado* that cited *Finley* three times was not oblivious to the commercial realities of the cases on which *Hurtado* built its analysis, including *Bonded Financial* and *Finley*. The trustee's attempt to reduce the transferee analysis to a simple question of who holds any "rights" over the relevant property is inconsistent with these precedents (not to mention the analysis applied in *Bonded Financial*, from which the "rights" language arises).[11]

Hurtado also cites *Ogden*. In *Ogden*, the Tenth Circuit held that an escrow agent was not an initial transferee of funds received for its client. *See Ogden*, 314 F.3d at 1193, 1204. *Ogden* likewise confirmed that *Bonded Financial* requires "full dominion and control over [funds] for one's own account, as opposed to receiving them in trust or as agent for someone else." *See id.*

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[11] *See Trustee's Response to Huntington's Objections to Report and Recommendation* (Oct. 10, 2012), at 127–28.

at 1204 (internal quotation marks omitted) (italics removed) (emphasis added). *Ogden*'s entire analysis is consistent with the rule that a transferee is one who (1) receives in the chain of title "for [his] own account," *id.*, and (2) "ultimately" controls the disposition of the funds to the next transferee, if any, in the chain of title, *see Finley*, 130 F.3d at 57.

Not one word of *Hurtado* contradicts these principles or supports the theory that a different test applies in the Sixth Circuit (or any other circuit) to identify "subsequent" transferees than applies to identify "initial" transferees. There is no logical basis for creating a different test — which is undoubtedly why no Court of Appeals, despite the variety of factual scenarios presented to it, has ever devised a different test for "subsequent" transferees than the well accepted test for all transferees.

II. THE BANKRUPTCY COURT RECAST *HURTADO* AND *BONDED FINANCIAL* TO REACH ITS RESULT.

To achieve its result, the bankruptcy court necessarily had to avoid the theoretical underpinnings of the *Bonded Financial* test. *Bonded Financial* plainly rejected the very proposition the bankruptcy court needed to establish in order to hold Huntington liable for over $54 million in "indirect" transfers, i.e., deposited funds that Huntington ultimately paid out at its client Cyberco's direction.

Despite this clear authority, the bankruptcy court held that the Sixth Circuit in *Hurtado* went no further than adopting *Bonded Financial*'s definition of an "initial" transferee, leaving the bankruptcy court "not constrained from rejecting" *Bonded Financial*'s application to subsequent transferees. R&R Tab 2, at 48–49. In addition, the bankruptcy court concluded that — even applying the *Bonded Financial* test for dominion and control — banks have sufficient dominion and control of deposited funds because of the nature of the debtor/creditor relationship between a bank and deposit account holders. *Id.* at 33–44. The trustee now endorses this flawed premise, which at least the Ninth, Tenth, and Eleventh Circuits have rejected. *See supra* Part I.B. (discussing *Incomnet*, *Malloy*, and *Chase & Sanborn*).[12]

A. The Bankruptcy Court Narrowed and Distorted *Hurtado*'s Analysis.

To reach its result, the bankruptcy court necessarily had to narrow the Sixth Circuit's holding in *Hurtado* as applicable only to "initial" transferees. In essence, the bankruptcy court posed the relevant question incorrectly as being whether "the targeted defendant [was] someone other than the initial transferee." *See* R&R Tab 2, at 48–49. But the court's question addresses itself over-inclusively to every entity in the world except the initial transferee: even non-subsequent transferees are not initial transferees. This attempted distinction was necessary, however, because the court had to avoid the actually relevant question: whether a bank is a transferee at all when it never receives and keeps deposited funds as its own.

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[12] The amici have no facts regarding, and so do not address, the alternative argument asserted by the trustee that Huntington was a transferee by virtue of security interests Huntington held pursuant to certain security and loan agreements between Cyberco and Huntington. *See Trustee's Response to Huntington's Objections to Report and Recommendation* (Oct. 10, 2012), at 123–26, 134–42. As is plain from the bankruptcy court's 2012 opinion, this was not the ultimate basis (or even an alternative basis) for the bankruptcy court's proposed conclusion of law number 15. *See* R&R Tab 2, at 34 n.66 ("Huntington's liability under Section 550(a)(2) can be decided simply based upon its relationship to Cyberco as its depository bank. Therefore, the court has not addressed Huntington's much different arguments regarding any Section 550(a)(2) exposure that might have arisen because of the attachment of its lien." (emphasis added)). Accordingly, the amici do not herein address the trustee's separate "security interest" argument.

Regardless, insofar as the trustee attempts to pin "transferee" status on a bank for simply receiving a "transfer" as defined in 11 U.S.C. § 101(54), this is inconsistent with the Courts of Appeals precedents addressed herein, none of which focuses on the definition of "transfer" to define the word "transferee." *See, e.g.*, *Finley*, 130 F.3d at 57 (rejecting the argument "that the word 'transferee' means the person to whom [a payment] is transferred" (internal quotation marks omitted)). Indeed, as discussed above in Part I.C.3, the insurance broker in *Finley* inarguably received a § 101(54) transfer of money, and held it in his own bank account. *Id.* at 55. But the broker was still not a "transferee." *Id.* at 59. As noted above, the Sixth Circuit cited *Finley* three times in *Hurtado*.

1. The bankruptcy court invented a false distinction between initial and subsequent transferees' level of dominion and control.

The bankruptcy court's entire analysis makes no sense on its own terms. First, the court acknowledged that *Hurtado* addressed "transferee" liability generally, without limiting it to "initial" transferees: "the Sixth Circuit clearly embraced *Bonded Financial*'s concept of establishing transferee liability under Section 550(a) based upon whether the defendant had control or not of the avoided transfer." R&R Tab 2, at 48 (emphasis added). But then, in an immediate switch, the bankruptcy court declared that by labeling Huntington something other than an initial transferee, it was freed of all controlling precedent:

> However, none of the Sixth Circuit cases that have discussed *Bonded Financial* has adopted the further proposition that something more is required when the targeted defendant is someone other than the initial transferee of the transfer avoided. Therefore, this court is not constrained from rejecting that peculiar aspect of what is otherwise a well reasoned opinion by the *Bonded Financial* panel.

Id. at 48–49.

The bankruptcy court attempted to avoid controlling Sixth Circuit precedent by suggesting that "something more" — namely, the legal dominion and control that is the very essence of the test for transferee status — is in fact irrelevant in a case involving a subsequent transferee. But it never said what test is relevant, or how to distinguish subsequent transferees from the rest of the world. The bankruptcy court thus frames the issue as a question of first impression in the Circuit. It is not. The court's analysis deviates from controlling Circuit precedent.[13]

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[13] In suggesting that *Hurtado* does not stand for the proposition that a bank is not a transferee of deposited funds, the bankruptcy court necessarily implies that *Hurtado* failed to appreciate that *Bonded Financial* (1) involved a bank holding deposited funds for ten days before becoming a (continued…)

2. The bankruptcy court turned *Hurtado*'s control analysis on its head.

Two of the bankruptcy court's central observations, each necessary to its conclusion, underscore the court's error. First, it reasoned that Huntington, like Ms. Hurtado, "was not under any legal obligation to follow the debtor's directions" and "was vested with legal authority to do what [it] liked with the funds." *See* R&R Tab 2, at 48 (internal quotation marks omitted). Second, in discussing *New York County National Bank v. Massey*, 192 U.S. 138 (1904), the court referred to "the absolute control a bank exercises over its customers' deposits." *See* R&R Tab 2, at 49.

These statements turn on their heads all relevant precedents that address the transferee status of banks holding deposited funds. Banks are under legal obligation to follow their clients' directions as to the disposition of deposited funds. *See, e.g.*, *Bonded Financial*, 838 F.2d at 893. Banks may not do whatever they like with clients' deposit funds. *See id.* at 894. And in no meaningful sense do banks exercise "absolute control" — let alone "dominion" — over deposited funds. *See, e.g.*, *Hurtado*, 342 F.3d at 530, 535; *Incomnet*, 463 F.3d at 1074 & n.12. On the basis of these flaws alone the Court could overrule proposed conclusion of law number 15. Banks are not the ultimate recipients of deposited funds. They cannot spend the funds like a deposit account holder can. They are not transferees of deposited funds.

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subsequent transferee, and (2) necessarily decided the point in time at which the bank had sufficient dominion and control to become any kind of "transferee" of deposited funds. This is untenable for all the reasons described in Part I above. And, in any event, the bankruptcy court's own statement that *Hurtado* adopted *Bonded Financial* does not qualify the word "transferee": "the Sixth Circuit clearly embraced *Bonded Financial*'s concept of establishing transferee liability." R&R Tab 2, at 48 (emphasis added). This Court should simply hold the bankruptcy court to its own correct observation and end it there.

3. The bankruptcy court in 2009 accepted, and in 2012 rejected, *Bonded Financial*.

The bankruptcy court fundamentally disagreed with *Bonded Financial* in its 2011 and 2012 opinions. But it agreed with *Bonded Financial* in 2009, before it made its factual conclusions about Huntington's good faith and lack of knowledge. The unnecessarily complex nature of this case is well demonstrated by the fact that the bankruptcy court cites three separate opinions dated 2009, 2011, and 2012 as the basis for proposed conclusion of law number 15. *See* R&R, at 32 & n.149.

In its October 7, 2009 Bench Opinion, *see* R&R Tab 8, the bankruptcy court ruled that Huntington was not an initial transferee of funds that Teleservices wired to Cyberco's deposit accounts at Huntington, citing *Bonded Financial* as authority. R&R Tab 8, at 9–15. In this opinion — before the bankruptcy court held a trial on Huntington's defenses and determined what result it desired — the court held no reservations that the Sixth Circuit had fully adopted the *Bonded Financial* test. The court even went as far as to state that "Huntington, in its role as solely the bank with which Cyberco had its own depository relationship, was not the recipient of any of these transfers . . . or a transferee for purposes of Section 550." *Id.* at 15:19–23 (emphasis added).

The court then approvingly described *Bonded Financial*'s "dominion and control" test at length. *Id.* at 15–19. The court noted the trustee's citation of two Sixth Circuit cases — *Baker & Getty* and *Hurtado* — as "adopting *Bonded*'s dominion and control test," and elaborated by saying, "This Court will not address either in detail because they apply that test no differently than did the Seventh Circuit in *Bonded*." *See id.* at 19:10–16 (emphasis added).[14] As demonstrated in Part I.C above, the bankruptcy court's 2009 observation was and still is true. The Sixth Circuit has fully adopted *Bonded Financial*.[15]

But, in its 2011 opinion, *see generally* R&R Tab 3, the bankruptcy court indicated that it was likely to switch its view and rule that Huntington was liable as a transferee based solely on its status as Cyberco's depository bank. After the court recited the facts of the case and the court's proposed factual conclusions, *see* R&R Tab 3, at 1–122, the court spent several pages in a published opinion theorizing that a bank is likely a subsequent transferee of its client's deposited funds. *See* R&R Tab 3, at 122–125 (discussing *Hurtado* and Huntington's receipt of deposits at length before concluding that "these are all issues that go to the few matters that remain to be tried"); *see also id.* at 39–41 (offering its opinion on one of many "issues remaining to be tried"). The Court made no attempt in 2011 to reconcile its newly theorized views with its holdings in 2009.

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[14] *See also* R&R Tab 8, at 20:2–4 (noting that the *Bonded Financial* "test must first determine whether the named defendant was even the intended recipient of the property transferred" (emphasis added)).

[15] In a subsequent portion of the 2009 opinion addressing the security interest that Huntington apparently held in Cyberco's deposit account, the bankruptcy court ruled that Huntington was an immediate transferee of Teleservices' wire transfers to Cyberco based on Cyberco's prior grant of the security interest, insofar as the trustee could "trace the deposits through the attachment of Huntington's lien." *See* R&R Tab 8, at 26:18–23. The amici are not apprised of the facts or agreements related to this security interest and so do not address this issue. The amici simply observe that the bankruptcy court abandoned this basis for proposed conclusion of law number 15 in its 2012 opinion when it also abandoned its 2009 ruling that Huntington was not a transferee merely by virtue of the deposit of funds in its client's account. *See supra* note 12, *quoting* R&R Tab 2, at 34 n.66 ("Huntington's liability under Section 550(a)(2) can be decided simply based upon its relationship to Cyberco as its depository bank. Therefore, the court has not addressed Huntington's much different arguments regarding any Section 550(a)(2) exposure that might have arisen because of the attachment of its lien." (emphasis added)).

Finally, in its 2012 opinion, *see generally* R&R Tab 2, the bankruptcy court gave full airing to its novel theory. Recognizing that the theory was at odds with *Bonded Financial*'s theoretical underpinnings, the court criticized Judge Easterbook's analysis in that case and framed *Hurtado* as only narrowly endorsing part of the *Bonded Financial* test — in stark contrast to the court's view of *Hurtado* as expressed in its 2009 opinion. In doing so, the court (a) ignored the unanimous Court of Appeals authority supporting the *Bonded Financial* test; (b) ignored that the Ninth, Tenth, and Eleventh Circuits had specifically ruled that banks holding deposited funds are not transferees merely by operation of the debtor/creditor relationship[16]; and (c) instead suggested that its novel theory was contrary only to one bankruptcy court opinion in Missouri. *See* R&R Tab 2, at 53–55 (criticizing *O'Neal v. Sw. Mo. Bank of Carthage* (*In re Broadview Lumber Co.*), 168 B.R. 941 (Bankr. W.D. Mo. 1994)). That case ruled consistently with the overwhelming weight of precedent, *see O'Neal*, 168 B.R. at 963–64, but the bankruptcy court declared it, like *Bonded Financial*, "incorrectly decided," R&R Tab 2, at 54.

B. The Bankruptcy Court's "Application" of the Dominion and Control Test Is Flawed.

Ultimately, the bankruptcy court purported to apply portions of *Bonded Financial*'s dominion and control test. But it reached a result directly contrary to the one required by a full and complete application of *Bonded Financial*.

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[16] *See Incomnet*, 463 F.3d at 1074 & n.12 (citing authorities discussing the debtor/creditor relationship and noting that "the bank is not the transferee" unless and until the bank's client "subsequently gives [the deposited] money to the bank to reduce its own debt"); *Malloy*, 33 F.3d at 44 n.5 ("Plaintiff's reliance on the fundamental banking principle that money deposited in a bank account becomes property of the bank, offset by a debt to the account holder, is misplaced. That legal concept does nothing to aid his argument . . . ."); *Chase & Sanborn*, 848 F.2d at 1200 n.11 (noting that the lower courts had posited that if a bank holding deposited funds was a transferee at all, it was a subsequent transferee, and observing simply that the bank "is not a transferee at all").

1. The court's "application" of the *Bonded Financial* test, on its own terms, lacks coherence.

The bankruptcy court purported to demonstrate that banks hold sufficient dominion and control of funds held on deposit to satisfy *Bonded Financial*. Although the court's opinion is very long, its analysis in this respect was superficial and quite brief. As discussed above in Part II.A.2, the court reasoned that Huntington "was not under any legal obligation to follow the debtor's directions" and "was vested with legal authority to do what [it] liked with the funds." *See* R&R Tab 2, at 48 (internal quotation marks omitted). And, in discussing *Massey*, 192 U.S. 138, the court referred to "the absolute control a bank exercises over its customers' deposits." *See* R&R Tab 2, at 49.

These three statements are exactly backward. Banks are under legal obligation to follow their clients' directions as to the disposition of deposited funds. *See, e.g.*, *Bonded Financial*, 838 F.2d at 893. Banks may not do whatever they like with clients' deposit funds. *See id.* at 894. And in no meaningful sense do banks exercise "absolute control" — let alone "dominion" — over deposited funds. *See, e.g.*, *Hurtado*, 342 F.3d at 530, 535; *Incomnet*, 463 F.3d at 1074 & n.12.

The bankruptcy court's analysis thus does not survive scrutiny. The bankruptcy court's assertions erroneously assume that banks could spend 100% of their clients' deposited funds as they please. It is the depositor, not the bank, that has dominion over the funds. *See Bonded Financial*, 838 F.2d at 894. This proposition is demonstrated not only by the nature of a demand deposit — which requires the bank to pay the deposited funds, at the depositor's direction, on demand — but also by the elaborate federal banking regulatory reserve, capital, and supervisory requirements that exist to ensure that depositors' funds are available to the depositor on demand.

2. The court's "application" of the test misapplied *Massey*.

The bankruptcy court applied the *Bonded Financial* dominion and control test relying upon the debtor/creditor relationship created upon the deposit of funds, citing the 1904 case *Massey*, 192 U.S. 138. *See* R&R Tab 2, at 49–52.[17] As explained above, two Courts of Appeals have dismissed this precise argument. *See supra* Part I.B; *see also supra* note 16 and accompanying text. The *Massey* passage on which the bankruptcy court relies explains depositors' and banks' debtor/creditor relationship in the context of explaining a bank's right of setoff of mutual debts, not transferee status. *See Massey*, 192 U.S. at 144–46. After concluding this discussion, *Massey* moves on to discuss an alleged transferee's liability for receiving a preference. *See id.* at 146–49. In this passage of *Massey* relevant to transferee liability, the Court says that the touchstone of avoidability of transfers is diminution of the transferors' estate. *See id.* at 147. The Court observes — giving rise to a century's worth of case law and bankruptcy policy — that a bank deposit does not diminish the deposit account holder's estate in the manner that is required to make a bank a transferee. *See id.* at 147. This aspect of *Massey* is perfectly consonant with — indeed, it is the pre-Code predecessor to — the modern rule that a bank holding deposited funds is not a transferee of those funds until the bank receives and keeps the funds as its own.

The bankruptcy court's refusal to apply well theorized precedent interpreting the word "transferee" provides an excellent example of something the Eleventh Circuit warned against in another of the leading transferee cases: that this very kind of hyper-technical but impractical application of the transferee provisions of the Bankruptcy Code could bring the whole system

[17] After relying on it, the bankruptcy court ultimately called *Massey* "an anachronism." *See* R&R Tab 2, at 52.

down: "As the Supreme Court has noted in another context, '[t]his system could easily fall of its own weight if courts or scholars become obsessed with hair-splitting distinctions' and lose sight of the real purpose of the laws being applied." *Chase & Sanborn*, 848 F.2d at 1202 (quoting *United States v. Bailey*, 444 U.S. 394, 406–07 (1980)).

This Court should decline the bankruptcy court's proposal to rewrite a century's worth of sound bankruptcy policy. Even if not constrained by the Sixth Circuit's *Hurtado* precedent, this Court should follow the reasoning of several Courts of Appeals, not that of the bankruptcy court. Accordingly, this Court should reject proposed conclusion of law number 15.

III. POLICY CONSIDERATIONS COUNSEL AGAINST THE BANKRUPTCY COURT'S UNPRECEDENTED INTERPRETATION OF "TRANSFEREE."

Policy considerations thoroughly vetted in the Courts of Appeals in *Bonded Financial*, *Finley*, and *Chase & Sanborn* persuasively counsel rejection of the bankruptcy court's proposed conclusion of law number 15. These considerations continue to compel an interpretation of "transferee" that does not include a bank that holds deposited funds for payment at its client's direction. In this context, it is important to recognize that the amici are not advocating freeing banks from "transferee" status, like any party, for amounts they receive and keep as their own. Nor do the amici advocate freeing banks from normal federal and state civil liability for truly culpable banks that might aid and abet or conspire with fraudsters.[18] The policy considerations here relate to banks that hold funds that they ultimately pay out to third parties at their clients' direction.

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[18] In this case, two of Teleservices' creditors sued Huntington unsuccessfully in this Court. *See El Camino Res., Ltd. v. Huntington Nat'l Bank*, 722 F. Supp. 2d 875, 929–30 (W.D. Mich. 2010) (Judge Neff granting summary judgment and dismissing most claims against Huntington). The fact that such remedies are available for culpable conduct is an additional argument favoring the Courts of Appeals' various interpretational and policy reasons for limiting the "transferee" provisions of the Bankruptcy Code.

A. Systemic Costs of Monitoring Millions of Deposits and Wire Transfers for Which Banks Could Be Held Liable Would Be Enormous.

Judge Easterbrook, in *Bonded Financial*, explained persuasively why policy considerations and the "functions of fraudulent conveyance law" weigh in favor of a practical interpretation of "transferee" in the Bankruptcy Code. *See Bonded Financial*, 838 F.2d at 893. The rule prevents "waste" and "costs of monitoring" hundreds of millions of transactions per week that would be required if banks had to inquire how transferors obtained all deposited funds received for clients' accounts. *See id.* at 892–93. As Judge Easterbrook noted, these exorbitant costs "would fall on solvent customers without significantly increasing the protections of creditors." *Id.* at 893. He noted:

> The potential costs of monitoring and residual risk are evident when the transferees include banks and other financial intermediaries. The check-clearing system processes more than 100 million instruments every day; most pass through several banks as part of the collection process; each bank may be an owner of the instrument or agent for purposes of collecting at a given moment. Some of these instruments represent funds fraudulently conveyed out of bankrupts, yet the cost of checking back on the earlier transferors would be staggering.

Id.

These principles are on display in this case. As the bankruptcy court's 2011 opinion describes at length, Huntington undertook significant investigation and monitoring activities at its own expense. *See* R&R Tab 3, at 5–26. Despite those efforts, the bankruptcy court here nonetheless found culpability on Huntington's part by broad inferential leaps as to what Huntington would have discovered (and been able to stop from happening) had its security officer, Mr. Rodriguez, told his colleagues about past conduct of its client's principal officer. *See* R&R Tab 3, at 26 (inferring what "presumably" would have been discovered, "established," and "concluded" if Mr. Rodriguez had reported Mr. Watson's background check).

Presumably, Huntington undertook the extensive efforts it did under the current state of the law, expecting, consistent with *Bonded Financial*, that its liability would not extend to funds that it received and paid out at Cyberco's direction. If a bank went to this much trouble for liability it likely estimated at a fraction of the $80 million for which the bankruptcy court now proposes to hold it liable, it is hard to imagine the costs of monitoring it (and all banks) would be forced to incur if the law were as the bankruptcy court here proposed. Judge Easterbrook's policy arguments on this point remain sound today for reasons well illustrated by this case.

B. Banks Would Be Subject to "Great and Unimagined Liability" and "Nuisance Suits and Settlements."

The Second Circuit in *Finley* practically predicted the case before this Court. Criticizing bankruptcy courts that interpret "transferee" too broadly, Judge Jacobs warned that banks should not be subject to "great and unimagined liability that is mitigated only by powers of equity." *Finley*, 130 F.3d at 56. Instead, trustees and bankruptcy courts should be limited by a reasonable statutory construction of the word "transferee." *See id.* Otherwise, the result "would be to render every conduit vulnerable to nuisance suits and settlements. The Seventh Circuit [in *Bonded Financial*] has characterized as 'misleading' the use of equity to separate sheep from goats . . . ." *Id.*

This explains one reason that Judge Easterbrook expressly noted that the Court was not appealing to equity but was "employ[ing] considerations of policy to *define* 'transferee.'" *See Bonded Financial*, 838 F.2d at 895 (italics in original). Defendants subject to a court's equity are still subject to nuisance suits and settlements. Defendants protected by a predictable definition are normally protected from trustees' frivolous lawsuits disregarding that definition.

Here the bankruptcy court proposes not exercising its discretion to reduce Huntington's liability. *See* R&R Tab 2, at 55–68. The bankruptcy court's approach would establish a legal regime that presumes liability, permits trustees' nuisance suits and settlements, and leaves it to bankruptcy courts' equitable power to reduce (or, not reduce) banks' liability by tens or hundreds of millions of dollars. This is not a rational system. There should be little question why the Courts of Appeals to have considered this proposition of federal bankruptcy policy have uniformly rejected it in favor of *Bonded Financial*'s "'more functional rule.'" *See Finley*, 130 F.3d at 56 (quoting *Bonded Financial*, 838 F.2d at 894).

Lest this Court think the amici unreasonably concerned about trustees' propensity to file baseless nuisance suits, consider the trustee's original legal position in this case: that Huntington was the initial transferee of all deposited funds. *See* R&R Tab 8, at 9:17–21. The trustee argued that Huntington had "no basis in law or fact to support [its] claim that it is not the initial transferee. The moment that Teleservices deposited funds in Cyberco's account a transfer was accomplished and title to the funds passed to Huntington." *Id.* The trustee's position flouted even the narrowest reading of *Bonded Financial* and *Hurtado*, but accused its opponent of having "no basis in law or fact" for asserting a position supported by every single Court of Appeals. This is distressing, especially considering the considerable power that bankruptcy trustees wield. Of course, the bankruptcy court rejected the trustee's argument formally, but reached the same result by simply rebranding Huntington a subsequent transferee of over $54 million that it did not keep as its own.

The trustee and bankruptcy court in this case demonstrated that the *Bonded Financial* and *Finley* courts were rightly cautious to define "transferee" — as a matter of statutory interpretation, not equity — to protect banks and other conduits that are not the ultimate recipients of transfers.

C. Transactions Should Be Viewed Holistically, Practically, and in View of Who Ultimately Received the Funds.

The Eleventh Circuit in *Chase & Sanborn* noted that the results in fraudulent conveyance cases must make sense, both factually and equitably, lest the weight of sweeping fraudulent transfer liability simply become unbearable. This "requires courts to step back and evaluate a transaction in its entirety to make sure that their conclusions are logical and equitable." *Chase & Sanborn*, 848 F.2d at 1199. Courts must "consider the goal of a law, and the effect of a particular ruling." *Id.* at 1202. Otherwise, the court warned, "As the Supreme Court has noted in another context, '[t]his system could easily fall of its own weight if courts or scholars become obsessed with hair-splitting distinctions' and lose sight of the real purpose of the laws being applied." *Id.* (quoting *United States v. Bailey*, 444 U.S. 394, 406–07 (1980)). The bankruptcy system could indeed fall of its own weight if freighted with a policy that permits avoidance actions (and results) as here, requiring a bank to pay over $54 million that it did not keep. This Court should not adopt such a policy.

CONCLUSION

The Court should reject proposed conclusion of law number 15 and hold that Huntington was not a transferee of funds held as deposits and ultimately paid out to third parties at its client's direction.

Respectfully submitted,

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